

UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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B. M. PHELPS and ALICE E. PHELPS, Appellants,  
v.

FLOYD HANSON, EZRA HANSON, SARA HANSON  
and EVA M. HAMMOND, Appellees.

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UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE DISTRICT OF  
MONTANA, BILLINGS DIVISION

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Appellants' Opening Brief

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Appellants' Opening Brief

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**Statement of Pleadings and Facts Disclosing Basis Upon  
Which It Is Contended That the District Court Had  
Jurisdiction and That This Court Now Has Jurisdiction  
Upon Appeal to Review the Order or Final Judgment  
Rendered.**

A.

The major issue in this case is whether or not the United States District Court for the District of Montana has jurisdiction to hear the case. The United States District Court

for the District of Montana based its order (R. 38) dismissing the amended complaint of the plaintiffs upon its memorandum decision (R. 29) which set forth that the United States District Court was without jurisdiction to hear and determine the issues involved for the reasons that the matter in controversy did not arise under the constitution and laws of the United States and treaties under their authority (R. 29-36) and that allegations contained in the amended complaint in respect to the amount in controversy were not sufficient to show that the matter in controversy is of the value exceeding Three Thousand Dollars.

In the event the United States District Court for the District of Montana was in error as contended by the appellants and the United States District Court had jurisdiction, clearly this Court has jurisdiction to reverse the United States District Court in the controversy.

## B.

Appellants contend that the United States District Court for the District of Montana had jurisdiction under the following provisions of **Section 41, Sub-Division 1, (Title 28) U.S.C.A.**:

**“Section 41. (Judicial Code, section 24, amended). Original jurisdiction.** The district courts shall have original jurisdiction as follows:

“(1) . . . .; civil suits at common law or in equity. First. Of all suits of a civil nature, at common law or in equity . . . .; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) . . . .”

C.

Appellants contend that the amended complaint (R. 2-11) and Exhibit "A", the treaty of May 7, 1868 (R. 11-22) between the Crow Tribe of Indians and the United States, which is by reference made a part of the complaint, in their entireties confer jurisdiction upon the United States District Court for the District of Montana in this case.

**STATEMENT OF THE CASE**

Appellants instituted this action in the United States District Court for the District of Montana to enjoin the appellees herein from diverting any of the waters from the south fork of Dry Head Creek (R. 10) which stream has its source in the Pryor Mountains (R. 4) in Carbon County, Montana, off the Crow Indian Reservation, and flows thence in a northerly direction upon and across the lands of the appellees, and thence on the Crow Indian Reservation upon and across the lands of the appellants (R. 4, 5), which lands of the appellants were at the time of the Crow treaty of May 7, 1868, and still are, located within the boundaries of the Crow Indian Reservation as it now exists (R. 6). Appellants allege that by virtue of the treaty of May 7, 1868, a certain tract of land was set aside in the then Territory, but now state of Montana for the use of the Crow Indians, which lands are described in Paragraph V of the amended complaint (R. 5, 6), and that the lands of the appellants are located within the boundaries of the Crow Indian Reservation (R. 6), but that the lands of the appellees and the points of diversion made by them of the waters of Dry Head Creek are located outside of and off the Crow In-

dian Reservation in the state of Montana (R. 8). Appellants also allege in their amended complaint that their lands are arid and dry (R. 8) and that during the months of May, June and July of each year the flow of water in Dry Head Creek is not sufficient to successfully irrigate the irrigable portions of the lands owned by appellants (R. 8) as designated in the amended complaint (R. 3, 4). That it is the desire of the appellants to irrigate one hundred and fifty (150) acres of their lands and that their lands will require all of the water flowing in the south fork of Dry Head Creek to successfully irrigate their crops. (R. 8, 9.)

Appellants also allege that defendants or appellees have unlawfully and wrongfully diverted all of the waters flowing in the south fork of Dry Head Creek to appellants' or plaintiffs' damage, and that they threaten to continue and intend to divert all of said waters during the coming irrigation seasons (R. 9).

It is next alleged in Paragraph XIV of the amended complaint (R. 9) that whatever rights, if any, the said defendants or appellees have to the use of the waters of south fork of Dry Head Creek are much later in time, subsequent and inferior to the rights of plaintiffs or appellants established and created by the Crow Treaty of May 7, 1868 (R. 9).

The rights acquired by plaintiffs or appellants to the waters of Dry Head Creek under the Crow treaty of May 7, 1868, are described as follows in the allegation contained in paragraph VIII of the amended complaint (R. 7):

“VIII. That by the establishment of the Crow In-

dian Reservation, on May 7, 1868, the United States became the trustee of the Crow Tribe of Indians, holding legal title to all of the lands and waters of the Crow Indian Reservation and at that time, on May 7, 1868, there was then reserved to said Indians and their successors in interest for irrigation and other beneficial uses upon the lands of said reservation, and exempted from appropriation under territorial or state laws or otherwise, all of the waters of reservation streams necessary for the successful irrigation of irrigable lands upon said reservation, including all of the waters of the south fork of Dry Head Creek, which are necessary for the successful irrigation of plaintiffs' lands herein described.”

It is also alleged in paragraph XVI of the amended complaint that a cloud exists upon plaintiffs' or appellants' title or right to the use of the waters of south fork of Dry Head Creek, by reason of the diversions of the defendants or appellants of these waters (R. 9).

There next appears the usual prayer for a preliminary and permanent injunction. (R. 10.)

To the amended complaint of the plaintiffs or appellants the defendants or appellees interposed consolidated motions to dismiss on six main grounds (R. 22-27), three of which directly concern this court as to the question of its jurisdiction, which are contained in the following paragraphs of defendants' consolidated motions:

“III. To dismiss the plaintiffs' amended complaint and action for the reason that the court is without jurisdiction, because the matter in controversy does not arise under (a) the Constitution of the United States, or (b) the laws of the United States, or (c) a treaty made under their authority.”

“IV. To dismiss the plaintiffs' amended complaint and action for the reason that the court is without jurisdiction, because the matter in controversy does not

exceed \$3,000.00, exclusive of interest and costs, as an inspection of the allegations of the amended complaint shows, . . . . ”

“V. To dismiss the plaintiffs' amended complaint and action for the reason that it appears from the face of the amended complaint the United States of America is a necessary and indispensable party plaintiff in the premises to bring and maintain any action on the part of the plaintiffs, or either of them. . . . ”

The other points raised in defendants' consolidated motions are immaterial as affects the jurisdiction of the United States District Court for the District of Montana. They deal with demands for a definite statement or bill of particulars and do not involve the question of jurisdiction.

Following the presentation of briefs (R. 28, 29), the United States District Court rendered its decision holding that in its opinion the Court had no jurisdiction to hear the controversy for the reasons that the matter in controversy was not one which arose under the constitution or laws of the United States or treaties made under their authority, and that the allegations in the amended complaint were insufficient to show that the value of the matter in controversy exceed \$3000.00 (R. 29-37). An order or final judgment dismissing the amended complaint of the plaintiffs and their cause of action was then filed and entered on February 11, 1947 (R. 38). An appeal was therefrom taken by the plaintiffs or appellants to this Court (R. 38-40) and the praecipe for designation of record duly filed (R. 42). The appellees designated an additional portion of record showing the proceedings had in connection with the filing of briefs (R. 45). The appellants adopted the points upon which they rely for appeal (R. 48, 49) filed in the United

States District Court for consideration by the United States Circuit Court of Appeals for the Ninth Circuit (R. 40).

## **SPECIFICATION OF ERRORS RELIED UPON**

### **I.**

The trial court erred in dismissing the amended complaint of plaintiffs herein and their cause of action.

### **II.**

The trial court erred in not overruling the defendants' consolidated motions to dismiss amended complaint, for more definite statement, etc., filed in said action.

## **ARGUMENT**

**The matter in controversy arises under the Crow treaty of May 7, 1868 (15 Stat. 649).**

It is our contention that the United States Courts have jurisdiction of this controversy under authority of the Judicial Code Section 24, as amended, Title 28 U. S. C. A., Sec. 41 (1)(a), which provides in part:

**“Section 41. (Judicial Code, Section 24 amended.) Original jurisdiction. The District Courts shall have original jurisdiction as follows:**

**(1) . . . .; Civil suits at common law or in equity.** First of all suits of a civil nature, at common law or in equity. . . .; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3000, and (a) arises under the constitution or laws of the United States, or Treaties made, or which shall be made under their authority. . . .”

The Supreme Court of the United States in the case of *Smith v. Kansas City Title and Trust Co.*, 41 S. Ct. 243; 255 U. S. 180, 65 L. Ed. 577, in construing the provisions of Section 41 (1) Title 28 U. S. C. A., stated (p. 585):

“The general rule is that where it appears from the

bill or statement of plaintiff that the **right to relief** depends upon the construction or application of the constitution or laws of the United States, and that such Federal claim is not merely colorable, and rests upon reasonable foundation, the district court has jurisdiction under this provision. (**Judicial Code Sec. 24**), (Emphasis supplied.) At an early date considering the grant of constitutional power to confer jurisdiction upon the Federal Courts, Chief Justice Marshall said: 'A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States whenever its correct decision depends upon the construction of either.' *Cohen v. Virginia*, 6 Wheat. 264, 379, 5 L. Ed. 257, 285; and again, when 'the right or title set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction.' *Osborn v. Bank of the United States*, 9 Wheat. 738, 822, 6 L. Ed., 204, 224. "These definitions were quoted and approved in *Patton v. Brady*, 184 U. S. 608, 611, 46 L. Ed. 713, 715 22 S. Ct. 493, citing *Little York Gold-Washing and Water Co. v. Keyes* 96 U. S. 199, 201, 24 L. Ed. 656, 658; *Tennessee v. Davis* 100 U. S. 257, 25 L. Ed. 648; *White v. Greenhow* 114 U. S. 307, 29 L. Ed. 199, 5 S. Ct., 923, 962; *New Orleans, M. & T. R. Co. v. Mississippi* 102 U. S. 135, 139, 26 L. Ed. 96, 97. This characterization of a suit arising under the constitution or laws of the United States has been followed in many decisions of this and other Federal Courts."

An Indian treaty consummated, ratified and proclaimed, such as the Crow treaty of May 7, 1868 between the United States and Crow Tribe of Indians (15 Stat. 649), has the full force and effect of a law of the United States and has been so recognized by the Congress of the United States.

Title 25 U. S. C. A. Sec. 71.

*United States v. Berry* 4 Fed. 779:

Whatever rights plaintiffs have to the use of the waters of the south fork of Dry Head Creek are established by

and arise out of the Crow treaty of May 7, 1868, and the construction placed upon the treaty by the courts. Plaintiffs in paragraph I of their amended complaint (R. 2) allege:

“That the jurisdiction of this court attaches by virtue of the fact that the rights of plaintiffs claimed herein arise under a treaty entered into on May 7, 1868, by and between the United States of America and the Crow Tribe or Nation of Indians, which said treaty was ratified by the Senate of the United States on July 25, 1868 (15 Stat. L. 649) and proclaimed August 12, 1868 by the President of the United States, a copy of which treaty is hereto attached, marked exhibit ‘A’ and made a part hereof.”

And in paragraph VI of the complaint (R. 6) it is alleged:

“That the lands and rights to the use of the waters of the south fork of Dry Head Creek, owned and possessed by the plaintiffs, were located within the boundaries of the Crow Indian Reservation as established by the treaty of May 7, 1868, and are still located within the boundaries of the Crow Indian Reservation as diminished by further treaties between the United States and the Crow tribe of Indians. That the lands of plaintiffs herein described and their rights to the use of the waters of the south fork of Dry Head Creek are located within the State and District of Montana.”

It will be our contention in the trial of this cause that the date of priority of plaintiffs to the use of the waters of the south fork of Dry Head Creek is May 7, 1868, the date of the Crow treaty with the United States, because the lands and the water rights thereto appurtenant are located on the Crow Indian reservation.

The Supreme Court of the United States in the case of United States v. Powers, et al, 59 S. Ct. 344, 346, 305 U. S. 527, 83 L. Ed. 330, in construing the Crow treaty of May 7,

1868 in a case involving water rights on the Crow Indian reservation, reaffirmed the doctrine of the treaty priority date laid down by the Supreme Court of the United States in the landmark case of **Winters v. United States**, 28 S. Ct. 207, 207 U. S. 564, 52 L. Ed. 340 in the following language:

“Respondents maintain that under the treaty of 1868 waters within the reservation were reserved for the equal benefit of tribal members (**Winters v. United States** 207 U. S. 564, 28 S. Ct. 207, 52 L. Ed. 340) and that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.

“The respondents’ claim to the extent stated is well founded.”

In the Winters case the Supreme Court of the United States first established the doctrine of reserved reservation waters for use on reservation lands with the date of priority as the date of the treaty setting aside the Indian reservation. In the decision in this case (28 S. Ct. 207, 212), the Court said:

“The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. **United States v. Rio Grande Dam and Irrigation Co.**, 174 U. S. 702 43 L. Ed. 1141, 19 S. Ct. 770; **United States v. Winans** 198 U. S. 371, 49 L. Ed. 1089, 25 S. Ct. 662. That the government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste . . . took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.”

If our interpretation of the Crow treaty of 1868 is cor-

rect, and this is the chief matter in controversy here, the defendants or appellees can have no defense as being prior in time to the rights of the plaintiffs. Their only defense could be abandonment by plaintiffs of their rights under the rule in the case of the **United States v. Hibner**, 27 F. 2d, 909, or that there was a surplus of water available at all times over the needs of plaintiffs.

This Court has decided that the laws of Montana have no bearing whatsoever concerning water rights on Indian treaty reservations. In its decision in the case of **United States v. McIntire** (101 F. 2d, 650, 654), involving water rights on the Flathead Indian Reservation in Montana, this Court stated:

“Appellees seem to contend that Michel Pablo acquired by prior appropriation the rights in question by local statute or custom, and that the Act of July 26, 1866, 43 U. S. C. A., Sec. 661, requires recognition of those rights. That statute, however, applies only to ‘public lands.’ *Winters v. United States*, 9 Cir. 143 F. 740, 747, affirmed 207 U. S. 564, 28 S. Ct. 207, 52 L. Ed. 340. Lands which are reserved are severed from the public domain. *Leavenworth, etc., R. R. Co. v. United States* 92 U. S. 733, 745, 23 L. Ed. 634; *United States v. Minnesota*, 270 U. S. 181, 206, 46 S. Ct., 298, 70 L. Ed. 539. The statute mentioned, therefore, does not, we think, apply here. Likewise, the Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation. In fact, the Montana Enabling Act specifically provided that Indian lands, within the limits of the state ‘shall remain under the absolute jurisdiction and control of the Congress of the United States.’ ” 25 Stat. 676 Section 4.

This Court has also emphatically ruled that federal courts have jurisdiction over controversies involving the interpretation of treaties made between the United States

and Indian tribes. In an almost parallel case, **McCauley v. Makah Indian Tribe et al**, 128 F. 2d 867, the matter in controversy was the interpretation to be given the Makah Indian treaty of 1859 (12 Stat. 939) between the Makah tribe and the United States, in determining the fishing rights of the Makah Indians. The provisions of the Makah treaty in dispute are identical with the provisions of the Yakima treaty of June 9, 1855, 12 Stat. 951, which were construed by the Supreme Court of the United States in the case of **Tulee v. State of Washington**, 62 S. Ct. 862, 86 L. Ed. 1115. The appellants attacked the jurisdiction of the federal courts. In its opinion this Court held (p. 868):

“This is an appeal from a decree of the district court enjoining the appellants, found to be and admitted here to be purporting to act as officers of the state of Washington in enforcement of its fish and game laws, from interfering with appellees’ certain fishing rights in the Hoko river, held to belong to and to be secured to the Makah Indian tribe and its members by treaty of 1859 between the tribe and the United States, 12 Stat. 939.

“The complaint seeking injunctive protection of the Indians’ rights under their treaty, contrary to appellants’ contention, is one whose subject matter is within the jurisdiction of the district court. 54 Stat. 143, 28 U. S. C. A., No. 41 Subd. (1) (a). (Emphasis supplied.)

In the Powers case the Supreme Court of the United States and this Court (59 S. Ct. 344, 94 F. 2d 783) construed the Crow treaty of 1868. In the Makah case the Supreme Court of the United States interpreted the certain provisions of the Yakima treaty of June 9, 1859, which were identical with the provisions of the Makah treaty involved in the Makah case. This Court held the United States Dis-

trict Court had jurisdiction which we consider controlling in this case at bar.

In the instant case appellants as successors in interest to original Crow Indian allottees succeeded to the rights of the original allottees to the waters of Crow reservation streams as reserved to them by the Crow treaty of 1868. Appellees are trespassing upon these rights of plaintiffs. The matter in controversy here involves an interpretation of the Crow treaty of 1868 as did the Makah case involve an interpretation of the Makah treaty of 1869.

There should be no question here that the federal courts have jurisdiction of the controversy under Title 28 U. S. C. A., Sec. 41, Subd. (1) (a).

The lower court relied upon numerous patent cases (R. 33-36) to sustain its position that the federal court had no jurisdiction of this case. We fail to see any similarity between a right arising under an Indian treaty and a right arising under a patent issued by the United States. At the time the United States issues a fee patent to a tract of land, it divests itself completely of all title and interest. Not so as to any right to the use of water on an Indian reservation or any other right reserved by a treaty between the United States and an Indian tribe. This Court in the **McIntire** case stated, **101 F. 2d. 650, 653:**

“The waters of Mud Creek were impliedly reserved by the treaty to the Indians. **Winters v. United States**, 207 U. S. 564, 577, 28 S. Ct. 207, 52 L. Ed. 340; **United States v. Powers**, 9 Cir. 94 F. 2d 783, 785, and cases cited. The United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians. **Minnesota v. Hitchcock**, 185 U. S. 373, 387, 22 S. Ct. 650, 46 L. Ed. 954.”

The only controversy which can exist in this case if the averments in plaintiffs' complaint are true is the construction to be placed upon the treaty in reserving for the lands of plaintiff the waters of the south fork of Dry Head creek with the date of priority as of the date of the Crow treaty, May 7, 1868. Appellants have alleged all of the waters of this stream are necessary for the successful irrigation of their lands (R. 8, Par. XI), and that the rights of the appellees or defendants are much later in time, subsequent and inferior to the rights of appellants or plaintiffs (R. 9, Par. XIX). Certainly the appellees cannot contend that their rights are prior to the rights of plaintiffs or that plaintiffs have abandoned their rights or that there is a surplus of water in the stream to take care of the needs of the lands of plaintiffs and defendants. What then is the purpose of appellees is so vehemently contesting the question of jurisdiction? It is very apparent that if the federal court agrees with our interpretation of the Crow treaty, the defendants have no defense to the action and with the limited amount of water available in the stream, their lands will be deprived of water which they are now enjoying as trespassers upon plaintiffs' treaty rights. No question but that the purpose of appellees is to avoid trial and determination of any issue and settlement of whatever controversy may exist by way of the interpretation of the Crow treaty by the federal courts, out of which comes plaintiffs' rights to the use of these waters.

The allegations contained in plaintiffs' amended complaint are sufficient to affirmatively show that the value

of the matter in controversy exceeds \$3000, exclusive of costs.

The lower court held that plaintiffs had made no sufficient showing in their amended complaint, that the value of the matter in controversy exceeded \$3000, stating in its opinion (R. 37) :

“In other words, when the value of the matter in controversy, exclusive of interest and costs, is challenged, it must be affirmatively shown to exceed \$3000. This has not been done in this case as appears conclusively from the authorities relied upon.”

As authorities the court cited the cases of **KVOS, Inc., v. Associated Press**, 299 U. S. 269, 81 L. Ed. 183, 57 S. Ct. 197, and **McNutt v. General Motors Corp.**, 298 U. S. 178.

We find no fault with the rule laid down by the Supreme Court of the United States in the **KVOS** case, 81 L. Ed. 183, 187:

“No facts are pleaded which show the value of that right. The complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars and the amount involved is in excess of that sum. Such a formal allegation is sufficient unless the bill contains others which qualify or retract from it in such measure that when all are considered together, it cannot fairly be said that jurisdiction appears on the face of the complaint, in which case the suit should be dismissed by the court *sua sponte* or upon the defendants' motion. In this case the formal allegation is not re-enforced or strengthened by other portions of the complaint; neither is it neutralized or weakened by qualifying or detracting allegations.”

The lower court in examining the amended complaint of plaintiffs was of the opinion that the only allegations contained in the complaint was the unsupported statement that the matter in controversy is of value exceeding \$3000. (R.

36.) This is not correct and the lower court is plainly in error.

Plaintiffs in their amended complaint in paragraph I allege (R. 2), "That the value of the matter in controversy exceeds, exclusive of costs, the sum of Three Thousand dollars (\$3,000)," and in paragraph XV (R. 9), allege:

"That plaintiffs intend to irrigate approximately one hundred fifty (150) acres planted to alfalfa hay, orchard and garden on the above described lands during the coming farming and irrigation season; that during the months of May, June, July, August and September of this year plaintiffs will require all of the waters flowing in the south fork of Dry Head Creek to irrigate their said crops."

And in paragraph X (R. 8) plaintiffs allege:

"That the aforesaid lands of plaintiffs are dry and arid in character and will not without artificial irrigation produce crops. That plaintiffs' predecessors in interest constructed a dam in the south fork of Dry Head Creek and an irrigation system to carry the waters of said creek to said lands. That with the assistance of artificial irrigation from the south fork of Dry Head Creek, said lands will produce and have produced crops of hay, grain and vegetables, with the exception of the years 1944 and 1945 as herein set forth."

These allegations contained in these three paragraphs construed together plainly amount to an allegation by plaintiffs that the value of an adequate water right to 150 acres of irrigable land and the dam and irrigation system appurtenant thereto exceeds without costs the sum of Three Thousand Dollars (\$3000), the matter in controversy involved in this case.

The lower court gave no consideration whatsoever to these allegations in plaintiffs' amended complaint. All of the allegations of the complaint must be considered as true

in consideration of defendants' consolidated motion to dismiss. There can be little, if any argument, to the value of a water right to 150 acres of irrigable land as not being worth at least \$3000. In any event plaintiffs have clearly so alleged in their complaint, which is all that is necessary under the rule in the cases cited by the lower court. If the value is less than \$3000 such is an issue and can be properly determined upon the trial of this cause.

**The United States is neither a necessary nor an indispensable party plaintiff in this action.**

In so far as the record in this case is concerned, no interest of the United States appears and we will stand on the record in this respect. It is only fair, however, to advise the Court that in the watershed of Dry Head Creek there may be certain Indian lands in trust status which would have a right to their pro rata per acre share of the available waters under the rule laid down in the Powers case at such time as the owners of these lands decided to construct an irrigation system to irrigate their lands. Irrigation of such trust land is extremely doubtful due to the small amount of water available in the south fork of Dry Head Creek. All of the present diverters of the waters of the south fork of Dry Head Creek have been named in this action.

We do not deem the presence of the United States necessary in this action. The Court in its decree could adjudicate rights between the parties and make its decree subject to these potential rights of trust lands at the time such lands were irrigated when such irrigable acres thereof

would possess the same pro-rata per-acre rights as other acres on the Crow Indian reservation in that watershed with the same priority.

Should the United States consider that the rights of its Indian wards would be affected by any decree entered in this case it could readily intervene in the action.

The real property involved in this controversy, plaintiffs' rights to the use of waters in the south fork of Dry Head Creek, are not in trust status. Plaintiffs have alleged title in fee to their rights to the use of said waters (Pars. III, V, XVI of amended complaint) (R. 3, 4, 9, 10) and to all of the waters flowing in said creek which are required for the adequate irrigation of their lands located within the boundaries of the Crow Indian reservation (Pars. XI, XV, XVI of amended complaint) (R. 8, 9, 10).

Defendants contend the United States **now** holds legal title to the lands and waters involved in this action, and hence is an indispensable party plaintiff. (R. 25, 26.) They are undoubtedly confused by the following allegations contained in paragraph VIII of plaintiffs' complaint:

“That by the establishment of the Crow Indian reservation, on May 7, 1868, the United States became the trustee of the Crow Tribe of Indians, holding legal title to all of the lands and waters of the Crow Indian reservation and at that time, on May 7, 1868, there was then reserved to said Indians and their successors in interest for irrigation and other beneficial uses upon the lands of said reservation, and exempted from appropriation under territorial or state laws or otherwise, all of the waters of reservation streams necessary for the successful irrigation of irrigable lands upon said reservation, including all of the waters of the south fork of Dry Head Creek, which are necessary for the successful irrigation of plaintiffs' lands herein described.”

Plaintiffs did not allege the United States now held in trust all of the lands and waters on the Crow Indian reservation. We alleged such was the situation on May 7, 1868, many years before even the survey of the reservation as provided in the treaty, before allotment and before the issuance of trust or fee patents.

Plaintiffs hold fee title to the lands and waters involved. The United States has no present interest in the waters of Dry Head Creek. No rights of the United States or of any trust lands and waters are involved in this controversy.

The defendants may be further confused by this language of the United States Circuit Court of Appeals for the Ninth Circuit in the case of **United States v. McIntire** 101 F. 2d., 650, 653:

“The waters of Mud Creek were impliedly reserved by the treaty to the Indians. **Winters v. United States**, 207 U. S. 564, 577, 28 S. Ct., 207, 52 L. Ed. 340; **United States v. Powers**, 9 Cir., 94 F. 2d 783, 785, and cases cited. The United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians. **Minnesota v. Hitchcock**, 185 U. S. 373, 387, 22 S. Ct. 650, 46 L. Ed. 954.”

There, the Court clearly had in mind lands and waters in trust status at the time of the treaty and before survey and allotment and the issuance of fee patents.

We respectfully submit the United States District Court for the District of Montana has jurisdiction to hear and determine the issues involved, and that defendants' consolidated motions to dismiss should be overruled.

Respectfully submitted,

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Personal service of the within and foregoing brief of appellants and receipt of three copies thereof is hereby acknowledged this.....day of August, 1947.

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By .....

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